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FAX Cover Page

To: Carol Russell

From: Roger Flynn

Date: April 5, 1996

Re: Sunnyside comments

pages (including cover): 6

Message:

WESTERN MINING ACTION PROJECT
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Via Fax - Hardcopy to Follow by Mail

April 4, 1996

Mr. J. David Holm, Director
Colorado Water Quality Control Division
4300 Cherry Creek Dr. South
Denver, CO 80222

Re: Proposed Consent Decree and Draft Discharge Permits - Sunnyside Gold Corp.

Dear Mr. Holm:

The following are the comments of the **Mineral Policy Center** (MPC) by their undersigned attorney regarding the proposed Consent Decree and Order (CD or proposed CD) and associated draft and current discharge permits regarding the Sunnyside Gold Corporation. MPC is a nonprofit citizens organization that has been concerned with the water quality impacts associated with the Sunnyside mine. Due to the length and complexity of the documents, these comments are arranged by page number or paragraph number for quick reference. Thus, the comments are not listed in order of importance.

Overall, the proposed CD and associated documents raise a number of serious concerns regarding the protection of water quality from active, inactive, and abandoned mines in Colorado. MPC respectfully requests that the state of Colorado reject the CD and associated permits until the following issues are resolved.

Para. 3 - It is not clear that the CD and other documents are "consistent with the purposes of the [Water Quality] Act." CRS 25-8-102(2)(emphasis added) states that "the public policy of this state [is] to conserve state waters and to protect, maintain, and improve, where necessary and reasonable, the quality [of water] ...." At best, the CD attempts to "maintain" water quality, it makes no progress towards improving water quality in the Animas Basin. For example, the CD assumes that existing sites in the basin (the proposed "mitigation" sites) are fully complying with the Clean Water Act. In actuality, these sites are point sources (adits, tunnels, tailings and waste piles, etc.) that should have been issued traditional point source discharge permits long ago (i.e., since these discharges are not "stormwater" under EPA and state policy).

Para. 4.g. - The "Reclamation Standards" listed as controlling future compliance ignores additional requirements under Rule 3 of the MLRB Rules. Namely, Rules 3.1.6 (Water), 3.1.7 (Ground Water), and 3.1.8 (Wildlife). Without meeting the requirements of these Rules, actions by the permittee are in violation of the Mined Land Act (and Rules). Thus, this section must be revised to include a mandatory requirement that all relevant MLRB Rules be met as part of compliance with the CD and permits.

Para. 8.c. - The waiver of the state's authority to require permits for the seeps and springs after termination of the existing and proposed permits unnecessarily restricts state prerogatives. This issue will be discussed in more depth in later paragraphs.

Para. 9.a. - The last sentence of this paragraph's release of SGC's liability if there is any maintenance of the downstream portion of the American Tunnel is too broad. This release could be used to nullify other conditions of the CD which require CDPS permit obligations for the tunnel.

Para. 9.b. - The waiver of SGC's liability for subsequent water quality changes is also too broad. As noted below, the proposed five year timeframe (after tunnel sealing) does not account for long-term water quality impacts resulting, or potentially resulting, from the site. Thus, a long-term liability and financial assurance mechanism must remain in place during the period in which water quality changes may occur. In addition, does this section imply that SGC or its heirs, assigns, etc. would not be liable under CERCLA? A statement should be added which makes clear that CERCLA liability is in no way waived by this CD and permits. Also, it should be stated that there will be public notice and review of the Division's "confirmation" that SGC has fulfilled all of its obligations noted in this section.

Para. 9.c. - The CD should discuss the environmental impacts associated with the Cement Creek diversion. In addition, this section assumes that the quality of the Cement Creek waters are equivalent to the quality of the American Tunnel waters - with no supporting documentation. If the quality of Cement Creek is worse (i.e., increased metals loading), than a corresponding adjustment of flows must be made in order to ensure that the downstream quality is not degraded during the timeframes discussed in this section. Also, SGC must do more than just "notice" the Division of the decrease or stoppage of the Cement Creek diversion. The state should have complete oversight and approval authority over all important actions undertaken as part of this CD.

Para. 10.a.(i) - The "or" in the first two sentences should be an "and" to avoid the chance that flows in the tunnel could continue.

Para. 10.a.(vii) - It should be noted that the MLR permit cannot be "released" until reclamation at the site is completed. Under MLRB Rules, "reclamation includes all measures taken to assure the protection of water resources, including costs to cover necessary water quality protection, treatment and monitoring as may be required by Permit, these Rules or the Act." MLRB Rule 4.2.1.(4).

Para. 13. - The sentence discussing "additional" remediation projects that SGC "may" notify the Division of, and that may have a "positive" impact on water quality is vague and not connected to any assurance that downstream water quality will actually be "improved," CRS 25-8-102(2), let alone "protected." A "positive" impact on water quality is in no way equivalent to a guarantee that water quality will be protected. In addition, the built-in discretion for SGC is too broad.

Para. 14 - This section is at the heart of the CD. Overall, there is no assurance that adverse water quality impacts associated with the Sunnyside operations, including the sealing of the tunnels, will all manifest within the limited five year period. It is common knowledge that acid mine drainage often appears, or at least worsens, over a much longer time period than the five years stated in the CD. Based on the proposed CD, SGC is released from liability under the Clean Water Act (i.e., for the seeps and springs) if the Reference Point quality is acceptable after roughly five years. What happens if additional quality impacts occur after that time?

The state should not consent to such a sweeping release. Continued monitoring over a much longer time period is required in order to ensure that water quality will indeed be protected. It is very possible that contaminated water will not reach the Reference Point within five years. More importantly, the CD does not discuss whether water backfilling behind the tunnel seals will result in additional chemical reactions with increased acid mine drainage. A release of permit obligations (and covenants not to sue) should not be made without an assurance that the water quality at the Reference Point at the end of five years (or slightly longer) will not be degraded further due to any actions regarding the Sunnyside mine and related facilities.

In addition, the ability of SGC to transfer the permit in paragraph d. also unnecessarily waives SGC's obligations. A transfer of the permit should not be able to be construed as limiting the requirement that the flows from the American tunnel are completely eliminated over the long-term. It should be noted that similar sealing actions at Summitville failed the first time and required large expenditures of monies to eventually correct.

Para. 16.a. - The term "feasible" must be defined. If it can mean economic feasibility, then that would be an unacceptable deference to SGC. The protection of water quality should not be determined by a company's financial determinations. Water quality protection measures must be based on technical feasibility, not on the company's bottom line.

Para. 16.b. - The "or" on the top line of p. 23 should be an "and" in order to correctly track the rest of the CD (see p. 31 for correct form). Otherwise, compliance with the "reclamation standards" would be discretionary with the company - something not allowed by the CD.

Para. 18. - The limitation of treatment to only 2.5 years severely undermines the entire proposal. What happens to contaminated discharges after that time? In addition, does the 1800 gpm treatment capacity account for the likely maximum flow (rain on snow event

during spring runoff), as it should? What happens to compliance requirements for the other sites in the event of premature termination? If there is premature termination, what about seeps and springs that will develop after the tunnel is sealed? These questions must be addressed in the revised CD and permits.

Para. 19. - The CD should require that in the event of premature termination, the existing tunnel permits must not only remain in effect but must be renewed. As noted in comments to Para. 18, under the Division's correct legal position, seeps and springs that develop under the premature termination scenario must be covered under new discharge permits.

Para. 20-22. - As noted earlier, the lack of any assurance that water quality will not worsen after the terms of Para. 14 are met seriously undermines the entire CD. No waiver of the right to require CDPS point source permits (or covenants not to sue) should be given based on the currently inadequate limited five year scenario.

Para. 24 (and Appendix B and attached draft permits for "mitigation") - The entire CD is based on new CDPS permits for the up-drainage "mitigation" sites as a means to hopefully offset the impacts from the pollution contained in the downstream seeps and springs that will develop upon tunnel sealing. However, these sites should already have been covered by traditional NPDES/CDPS point source permits. See EPA Policy contained in Dec. 22, 1993 letter from Max Dodson to Montana Water Quality agency (copy to Colorado WQCD).

The company cannot utilize the cleanup of the upstream sites as a cover for its downstream pollution since the company (and other owners) are liable for the pollution discharging from the adits, piles, workings, etc. at these sites. The proper action is to require these sites to obtain traditional permits, meet water quality requirements at the sites, and then resolve the Sunnyside mine problems. Merging the sites into one overall cleanup plan ignores the Clean Water Act's requirement that these upstream sites should have been permitted long ago. According to EPA requirements, the existing "storm water only" permits are inapplicable to the mine drainage currently being discharged from these sites.

Para. 25. - The CD lacks any discussion as to whether the $5 million financial assurance will cover all environmental and reclamation requirements discussed in the CD. Without firm assurances that these monies are sufficient to remediate all water quality impacts, the CD must be rejected.

Para. 26. - The force majeure provisions are extremely broad. At a minimum, increased pollution loadings and stream flows not anticipated in the CD should be excluded from coverage under this section.

Para. 31. - The problems noted with the overly broad covenants not to sue are discussed above. As such, they should be rejected. In any event, the CD must reiterate that this section cannot in any way be construed as a concession of the Division's authority to bring these types of suits in the future in Colorado.

Para. 33. - The last sentence should add: "or any other person or entity." In this way, the CD makes clear that other persons not specifically bound by the CD may utilize enforcement mechanisms available to them under the Clean Water Act.

Appendix A - The limitation of compliance monitoring to Zinc only is unacceptable, especially since the CD does not discuss whether other metals problems may exist (or increase) as a result of the termination of the current water quality treatment systems. Although Zinc may be a potential indicator, other metals (and pH) must be part of the compliance system.

Conclusion

MPC appreciates the opportunity to comment upon these important issues. MPC respectfully requests that the CD be withdrawn until the above mentioned issues are resolved. We would welcome the opportunity to meet with you to discuss these matters in person. Thank you.

Sincerely,

Roger Flynn
Attorney for the Mineral Policy Center

cc: Carol Russell, EPA
Mike Long, Colo. DMG
Aimee Boulanger, MPC
Karen Kishbaugh, Colo. A.G.'s Office